EDITOR'S NOTE

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87-1102

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES L. SCHLEIGH, ET AL.,

Petitioners,

v.

ESTHER V. REIGH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of fees against a State found not to have violated federal law?

LIST OF PARTIES

The parties to this proceeding below were Esther V. Reigh, Ivery Mae Simkins, David Michael Simkins and Lenora C. Dannie, plaintiffs and then appellees/cross-appellants; and Charles L. Schleigh, in his official capacity as Principal Clerk of the District Court for Washington County, Maryland, Nancy Mueller, in her official capacity as Clerk of the District Court for Howard County, Maryland, and William A. Dorsey, in his official capacity as Administrative Clerk of the District Court for Baltimore City, Maryland, defendants and then appellants/cross-appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Clerks of the Maryland District Court (Charles L. Schleigh, Nancy Mueller and William A. Dorsey), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland

have decided the issue raised by this petition. The opinion of the court of appeals holding that plaintiffs are entitled to attorneys' fees is reported at 829 F.2d 1334, and is reprinted in the separate appendix to this petition ("App.") at 1a-4a. The district court's memorandum and order awarding attorneys' fees is unreported and is reprinted at App. 5a-38a. The district court's order and judgment entering final judgment in favor of defendants and dismissing this action is unreported and is reprinted at App. 39a-40a.

The prior decision of the court of appeals, reversing the district court on the merits and upholding the constitutionality of Maryland's post-judgment attachment rules, is reported at 784 F.2d 1191, and is reprinted at App. 41a-73a; this Court's order denying certiorari is reported at 107 S.Ct. 167, and is reprinted at App. 74a. The decision of the district court holding that Maryland's

post-judgment attachment rules were unconstitutional is reported at 595 F.Supp. 1535, and is reprinted at App. 75a-164a. The permanent injunction and final order of the district court is unpublished and is reprinted at App. 165a-172a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 2, 1987. This petition was filed within 90 days of that judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988 provides, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondents (plaintiffs below) filed this civil rights action under 42 U.S.C. §1983 in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief against three state officials (the "State") in their respective official capacities as clerks of the Maryland District Court. Plaintiffs alleged (1) that Maryland's court rules governing post-judgment attachment procedures were unconstitutional, and (2) that in issuing attachment orders pursuant to those rules, the State deprived plaintiffs of their property without due process.

Prior to the decision of the district court holding the rules unconstitutional, 595 F.Supp. 1535 (App. 75a-164a), the rules were amended, effective July 1, 1984. Those rules require that judgment debtors be notified that federal and state exemptions may be

available and that a judgment debtor has the right to contest an attachment. The rules also provide that within 30 days of an attachment, a judgment debtor may file a motion claiming an exemption, and that if a hearing is requested, it must be held promptly.

On October 29, 1984, the district court found the amended (post-July 1, 1984) Maryland rules unconstitutional and entered judgment for the plaintiffs. 595 F.Supp. 1535 (App. at 75a-164a). The State appealed and the Fourth Circuit reversed, holding that the rules are constitutional. Reigh I, 784 F.2d 1191 (App. at 41a-73a).[1/]

Notwithstanding the Fourth Circuit's reversal and this Court's denial of certiorari, 107 S.Ct. 167 (1986), on plaintiffs' motion, the district court ordered the State

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[1/] This Court denied plaintiffs' petition for a writ of certiorari. 107 S.Ct. 167 (1986) (App. at 74a).

to pay the plaintiffs' attorneys' fees, finding "that this lawsuit actually caused no change in the Rules, but did achieve a limited change in the notice actually given to judgment debtors in post-judgment garnishments. Plaintiffs, therefore, are 'prevailing parties' to a very limited extent." (App. at 30a.) However, final judgment was entered in favor of the State and against the plaintiffs on all counts, and the case was dismissed with prejudice. (App. at 40a.)

The State appealed the district court's attorneys' fees award and plaintiffs cross-appealed, contending they were entitled to even more fees than those awarded, and that judgment should have been entered in their favor on certain issues. The Fourth Circuit affirmed in both appeals. Reigh II, 829 F.2d 1334 (App. at 1a-4a).[2/]

[2/] The fee award approved by the Fourth Circuit in Reigh II was $2,409.20. 829 F.2d at 1335 (App. at 2a). Plaintiffs have filed an application for an additional

REASONS FOR GRANTING THE WRIT

SUMMARY

The State petitions this Court to review this case for the reasons stated by Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982). The Fourth Circuit continues to apply a "prevailing party" standard which is not consistent with the intent of the Civil Rights Attorney's Fees Act and which conflicts with the standard applied in other circuits. See 455 U.S. at 966-67.

Since Long v. Bonnes, the split in the circuits has grown and sharpened. Thus, there is even more reason why this conflict should be resolved. Now, seven circuits

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$7,751.22 in fees as compensation for defending that award in Reigh II. Notwithstanding the modest amount involved, the State pursues this matter because of the importance to the State of vindicating the principle that it should not be compelled to pay fees in a case that it won.

apply the rule rejected by the court below, and require that to be a "prevailing party" entitled to attorneys' fees, the plaintiff must establish that the defendant's conduct violated federal law. In direct conflict with that rule is the one followed by three circuits, including the Fourth Circuit in this case, requiring only some factual connection between a plaintiff's lawsuit and the defendant's post-litigation conduct, even when, as here, the law of the case is that the defendant did not violate federal law.

This case presents starkly the important question of whether the undisputed prevailing party on the merits must nevertheless pay plaintiffs' attorneys' fees. The Fourth Circuit's decision constitutes a serious misreading of the Attorney's Fees Act. As this Court's post-Long v. Bonnes decisions make clear, the Act was not intended to award fees against a state absent a determination

that the state violated federal law, nor was it designed to compel prevailing defendants, whose rights and legal positions were vindicated, to pay the losing plaintiffs' attorneys' fees.

Furthermore, the Fourth Circuit's decision is incompatible with the State's Eleventh Amendment immunity in federal court. While Congress may override that immunity, and it did so in the Attorney's Fees Act, Congress intended to override the State's immunity only when the State violated federal law. In Reigh I, the Fourth Circuit held the State did not violate federal law.

THIS CASE PRESENTS THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER THE CIVIL RIGHTS ATTORNEY'S FEES ACT AUTHORIZES THE AWARD OF FEES AGAINST THE STATE WHEN IT WAS FOUND NOT TO HAVE VIOLATED FEDERAL LAW.

I. The Circuits Are Sharply Split On The Standard To Be Applied In Determining A "Prevailing Party".

In affirming the district court's award of attorneys' fees, the Fourth Circuit

applied a purely factual prevailing party standard of whether "plaintiffs' actions caused defendant to remedy his errant ways." Reigh II, 829 F.2d at 1335 (App. at 3a). Two other circuits (the Second and Third) apply the prevailing party standard applied by the Fourth Circuit in this case, holding that merely an identifiable factual connection, as distinguished from a legally required one, between the lawsuit and the action taken by the defendant entitles the plaintiff to fees as a prevailing party.[3/] In contrast, seven circuits (the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth) hold that to be a

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3/ See, e.g., Gerena-Valentin v. Koch, 739 F.2d 755, 758 (2nd Cir. 1984) (holding that "the prevailing party must show a causal connection between the relief obtained and the litigation in which fees are sought"); N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1167 (3rd Cir. 1982), cert. denied, 460 U.S. 1052 (1983) ("as long as they [plaintiffs] can establish causation between their litigation and 'some of the benefits' they sought, they have prevailed for purposes of section 1988") (citation omitted); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), see n.7, infra.

prevailing party for purposes of the Attorney's Fees Act, the plaintiff not only must cause the relief secured, but also must be legally entitled to that relief.[4/] The

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[4/] See Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978) (setting forth two-pronged test requiring that the lawsuit be causally related to the benefits received and that the benefits be required by law); Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982) ("a plaintiff may . . . recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law")(emphasis added), citing Nadeau v. Helgemoe; Fiarman v. Western Publishing Company, 810 F.2d 85, 86 (6th Cir. 1987) (stating that the Sixth Circuit has adopted the two-part test set forth in Nadeau v. Helgemoe); Palmer v. City of Chicago, 806 F.2d 1316, 1322 (7th Cir. 1986), cert. denied, 107 S.Ct. 2180 (1987) ("'[i]f it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense'") quoting Nadeau v. Helgemoe; United Handicapped Federation v. Andre, 622 F.2d 342, 346 (8th Cir. 1980) (adopting Nadeau standard); Jensen v. City of San Jose, 806 F.2d 899, 901 (9th Cir. 1986) (en banc) ("'when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. . . . These policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant'"); Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986) (stating that the plaintiff "must also demonstrate that the defendant's conduct in response to the lawsuit was

confusion on this point is confirmed by the fact that different panels within several circuits apply these conflicting standards inconsistently.[5/]

The extraordinary confusion in this important and intensely litigated area of the law is demonstrated further by the fact that the specific holding of the court below -- that plaintiffs are prevailing parties even though their award of §1983 relief was reversed in its entirety on appeal -- is in

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required by the Constitution or federal law, i.e. the defendant's actions must be legally required").

5/ Compare Miller v. Staats, 706 F.2d 336, 341-42, nn. 31 and 34 (D.C. Cir. 1983) with Commissioners Court of Medina County v. United States, 683 F.2d 435, 441 (D.C.Cir. 1982); compare Fields v. City of Tarpon Springs, 721 F.2d 318, 321 (11th Cir. 1983) with Doe v. Busbee, 684 F.2d 1375, 1381 (11th Cir. 1982). The Fifth Circuit has also been inconsistent in applying the prevailing party standard. See Hennigan v. Quachita Parish School Board, 749 F.2d 1148, 1151 (5th Cir. 1985) ("The Fifth Circuit opinions have not articulated a consistent standard for measuring whether a plaintiff whose efforts did not result in a judgment in his favor has succeeded sufficiently to be a prevailing party.").

conflict with direct holdings of panels in at least four federal circuits.[6/]

Two justices of this Court, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting), criticized the prevailing party standard applied by the Fourth Circuit, recognized that a conflict existed between the standard applied by the Fourth Circuit and that applied by the First Circuit, id. at 966-67, and emphasized the need for this Court to resolve this conflict:

> It is clear beyond peradventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have enforced the civil rights laws or to have promoted their policies for the benefit of the public at large. The [Fourth Circuit's] Bonnes

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6/ See Turner v. McMahon, 830 F.2d 1003, 1009 (9th Cir. 1987); Merkil v. Scovill, 787 F.2d 174, 180-81 (6th Cir.), cert. denied, 107 S.Ct. 585 (1986); Harris v. Pirch, 677 F.2d 681, 689 (8th Cir. 1982); Ryan v. Mansfield State College, 677 F.2d 354, 355 (3rd Cir. 1982).

standard,[7/] at least as applied in No. 80-2153, seems largely to disregard this central purpose of §1988, awarding attorney's fees even if the discernible benefit was conferred gratuitously by the defendant or was undertaken simply to avoid further litigation expenses. I would grant certiorari in one or both of these cases to resolve the conflict among the Circuits and to establish a standard consistent with the purposes of the Act.

Id. at 967.

7/ In Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979), the Fourth Circuit set forth the prevailing party standard used in that circuit:

> If, as in this case, there is initially a genuine dispute as to whether the plaintiff fee claimant is a 'prevailing party', inquiry on that question might well proceed first. This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

Since Long v. Bonnes, the conflict between the circuits has increased: five circuits have followed the First Circuit and adopted the rule that a prevailing party must be legally entitled to the relief secured, see n.4, supra, and two circuits have followed the Fourth Circuit's lead in Bonnes. See nn.3, 7, supra.[8/]

It is a matter of great public importance to establish a uniform prevailing party standard and eliminate the inconsistent judg-

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[8/] The confusion in the lower federal courts reflected by this increasing split is exacerbated further by widespread disagreement on the amount of success a plaintiff must meet to qualify as a prevailing party. While this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), observed that one view requires such parties to succeed on "any significant issue", id. at 433, quoting Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), it also noted that the Fifth Circuit requires a plaintiff to be successful on "the central issue". 461 U.S. at 433, n.8, citing Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981). Since Hensley, appellate courts from at least two other federal circuits have adopted "the central issue test". See Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1555-56 (11th Cir. 1987); Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 182, 186-87 (6th Cir. 1983).

ments resulting from the plainly conflicting standards now applied in the lower federal courts.[9/] The Civil Rights Attorney's Fees Act plays a central role in the litigation of thousands of important cases in the federal courts. "As more and more litigation has ensued in which claims for attorney's fees are made under the Act, however, more troublesome questions as to when a party has 'prevailed' have confronted the Courts of Appeals." Long v. Bonnes, 455 U.S. at 962 (Rehnquist, J., and O'Connor, J., dissenting). This Court should grant review in this case "to establish a [prevailing party] standard consistent with the purposes of the Act." Id. at 967.

9/ The persistence of this conflict, notwithstanding this Court's post-Long v. Bonnes decisions, see pp.17-20, infra, is confirmed not only by the instant case but also by a just published decision from a district court in the Fourth Circuit, recognizing explicitly that the standard applied in that circuit is in conflict with that applied in other circuits. See ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [prevailing party] problem differently than the Fourth Circuit.").

II. The Decision Below Conflicts With The Intent Of The Attorney's Fees Act And With Post-Long v. Bonnes Holdings Of This Court.

The decision below is inconsistent with both congressional intent and the reasoning of decisions of this Court. The purpose of the Attorney's Fees Act is to enable private citizens "to assert their civil rights, and . . . have the opportunity to recover what it costs them to vindicate these rights in court." S.Rep. No. 94-1011 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5910.10/

10/ See also City of Riverside v. Rivera, __ U.S. __, 106 S.Ct. 2686, 2895 (1986) ("Congress enacted §1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.") (emphasis added), citing H.Rep. No. 94-1558, p.3 (1976). That Congress presupposed such a fee recovery is contingent upon a plaintiff's success on and vindication of his or her civil rights is reflected further in its concern that losing plaintiffs would have to pay their opponent's counsel fees. S.Rep. No. 94-1011 (1976), U.S. Code Cong. & Admin. News at 5912 ("Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes.").

Further, since denying review in Long v. Bonnes, this Court has recognized that "requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiffs' legal fees would be a radical departure from long-standing fee-shifting principles adhered to in a wide range of contexts." Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983). See also Hewitt v. Helms, __ U.S. __, 107 S.Ct. 2672 (1987) (a party who litigates to judgment and loses on all claims is not a "prevailing party"); Kentucky v. Graham, 473 U.S. 159 (1985) (fee liability runs with merits liability).11/ Thus, by compensating plaintiffs' counsel even though plaintiffs

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11/ Not surprisingly, the "typical formulation" expressed in Hensley v. Eckerhart, 461 U.S. 424 (1983), concerning a party's eligibility for attorney's fees under 42 U.S.C. §1988, recognizes "that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" 461 U.S. at 433 (emphasis added), quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

vindicated no federal rights, the Fourth Circuit disregarded manifest congressional intent and this Court's post-Long v. Bonnes decisions.

Last Term's decision in Hewitt v. Helms is illustrative of the conflict between the decision below and the reasoning of this Court's recent attorneys' fees decisions. Because the losing plaintiff in Hewitt obtained, at most, "an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim," 107 S.Ct. at 2675, he was not a prevailing party as "[t]hat is not the stuff of which legal victories are made." Id.

In Reigh I, the Fourth Circuit rejected plaintiffs' federal constitutional claims, reversed the district court on the merits, and upheld Maryland's post-judgment attachment procedures. That, too, "is not the stuff

of which legal victories are made."[12/] Because the court below rejected plaintiffs' claim that the State violated federal law and yet awarded plaintiffs attorneys' fees, the Fourth Circuit "decided a federal question in a way in conflict with applicable decisions of this Court." Sup.Ct.R.17.1 (c).[13/]

12/ In the court below, the plaintiffs cross-appealed on several issues, maintaining, inter alia, that they were prevailing parties because their lawsuit caused a change in the Maryland rules, which they contended were still unconstitutional. However, the district court specifically found "that plaintiffs' efforts in this litigation did not cause the changes between the Old Rules and New Rules," (App. at 29a), and this finding was not disturbed on appeal. See 829 F.2d at 1336 (App. at 4a). Furthermore, even if plaintiffs could establish the required causal connection between their lawsuit and the revision of the Maryland rules, that would not entitle them to attorneys' fees because by the time they filed their non-class action suit -- and well before the time the rules were amended -- they regained full use of their bank accounts, and so were no longer subject to Maryland's attachment procedures. See Reigh I, 784 F.2d at 1199-1200 (Widener, J., dissenting) (App. at 70a-73a). Thus, the amended rules afforded plaintiffs absolutely no redress. Accord Hewitt v. Helms, ___ U.S. at ___, 107 S.Ct. at 2677.

13/ The Fourth Circuit affirmed the district court's award of attorneys' fees, finding that the trial court's "factual findings are not clearly erroneous." 829 F.2d at 1336 (App. at 4a). That approach begs the

III. The Eleventh Amendment Bars The Award Of Attorneys' Fees Against The State Absent A Violation Of Federal Law.

The district court, whose attorneys' fee award was affirmed on appeal, found that plaintiffs were prevailing parties solely because "[a] final change, that the notice to the debtor contain a provision notifying the debtor of his right to a hearing, was recommended in this court's [subsequently reversed] decision and appears from the record to be a permanent change . . . ." (App. at 29a-30a) (emphasis added).

Thus, the notice was provided in response to the district court's "decision",

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legal question of whether plaintiffs prevailed as a matter of law and vindicated any federal rights. "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 n.15 (1982). In Reigh I, the Fourth Circuit held that plaintiffs did not prevail. Thus, in Reigh II, the Fourth Circuit should not have deferred to the district court's factual findings as they were based "upon a mistaken impression of applicable legal principles."

a decision which unquestionably was reversed by the Fourth Circuit. Therefore, the "recommended notice" is neither required by the United States Constitution, nor by any other federal law, and thus can be changed or deleted by the State at any time.[14/] Despite the absence of any legal requirement for this notice (and the absence of any other allegedly obtained relief), and plaintiffs' undisputed loss on the merits, the Fourth Circuit held that plaintiffs were entitled to attorneys' fees. The Eleventh Amendment prohibits this result.

"The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'"

14/ Thus, whatever the merit of the district court's and the Fourth Circuit's fact-based "catalyst theory" in another case when the plaintiff obtains a permanent and substantial change in state law or policy, even if that change is not required by federal law, this theory is certainly inappropriate in this case when the change is so minor and it can be undone at any time.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984) (citations omitted). Plainly, this case against state court clerks in their official capacities is against the State. See Hutto v. Finney, 437 U.S. 678, 700 (1978) ("suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself").15/

Congress has the power to override the State's immunity, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and it did so when it enacted the Attorney's Fees Act, 42 U.S.C. §1988, see Hutto v. Finney, which provides for the allowance of reasonable attorneys' fees as part of the costs "[i]n any action or proceeding to enforce a provision of . . .

15/ Plaintiffs sued three state officials in their official capacities as clerks of the Maryland District Court. (Plaintiffs' Complaint at 1 and ¶¶8-10.)

[42 U.S.C. §] 1983."[16/] However, the Act overrides the State's immunity if but only if the action or proceeding is one in which the plaintiff secures rights within the meaning of §1983, and thus is a §1983 prevailing party.

In Reigh I, the Fourth Circuit held that the State did not violate federal law. Thus, plaintiffs did not secure any right within the meaning of §1983; therefore, as a matter of law, they cannot be §1983 prevailing parties, see, e.g., Kentucky v. Graham, 473 U.S. 159 (1985), on whose behalf a federal court is authorized to enter a monetary judgment against the State.

16/ "Under §5 [of the Fourteenth Amendment] Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claims falls within the category of 'appropriate' legislation." Maher v. Gagne, 448 U.S. 121, 132 (1980).

The Attorney's Fees Act was not intended to override the State's immunity in this case because plaintiffs did not secure any federal rights.[17/] Therefore, the Eleventh Amendment bars the Fourth Circuit's award of attorneys' fees.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit. Following review, that judgment should be reversed.

17/ Nor was a fee-shifting statute such as §1988 ever intended to override the State's immunity by departing, in the absence of a plaintiff's success on the merits or securing of some right, from the American Rule "that each party is to bear the expense of his own attorney." Hanrahan v. Hampton, 446 U.S. 754, 758 (1980). "[V]irtually every one of the more than 150 existing federal fee-shifting provisions predicates awards on some success by the claimant." Ruckelshaus v. Sierra Club, 463 U.S. at 684 (emphasis in original). Here, because plaintiffs had no success in establishing that the State violated federal law, no basis exists to abrogate the State's immunity.

Respectfully submitted,

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